

The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

MARK E. PHILLIPS,

Plaintiff,

v.

THE EXECUTOR OF THE ESTATE OF  
ROBERT MORRIS ARNOLD, JANE DOE  
ARNOLD, wife of the late Robert M. Arnold  
and their marital community composed  
thereof; JULIA DE HAAN, JEFFREY ALAN  
SMYTH, JUANITA MARY JARDINE, aka  
JAN MARY WALLACE, aka SARAH  
BLAIR, aka JOAN REARDON, aka  
JARDINE MARY WALLACE, AND aka  
ROB L. SCRUGGS; CHRISTOPHER ERIC  
LUNDVALL, and DOES 1-25,

Defendants.

Case No. 2:13-cv-00444-RSM

DEFENDANTS DE HAAN'S AND  
SMYTH'S MOTION FOR SUMMARY  
JUDGMENT OF DISMISSAL OF  
CLAIMS FOR TORTIOUS  
INTERFERENCE WITH CONTRACT  
(MOD); TORTIOUS INTERFERENCE  
WITH CONTRACT (BANANA); FRAUD;  
CONSPIRACY; TRESPASS TO  
CHATTELS; AND CONVERSION

[FRCP 56; LCR 56]

NOTE ON MOTION CALENDAR:  
FRIDAY, JUNE 13, 2014

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## I. INTRODUCTION

Plaintiff Mark Phillips commenced this action on March 12, 2013. By its Order dated August 16, 2013 (Dkt. #27 at 14), this Court dismissed the Computer Fraud and Abuse Act (CFAA) claims against defendants de Haan and Smyth on statute of limitations grounds. Mark Phillips' remaining claims against defendants Smyth and de Haan are for tortious interference with contract (MOD Systems Incorporated), tortious interference with contract (Banana Corporation), fraud, conspiracy, trespass to chattels, and conversion. De Haan and Smyth now move pursuant to FRCP 56 for dismissal of all of these remaining claims, on statute of limitation and other grounds.

## II. STATEMENT OF FACTS

### A. Procedural History

In March 2011, Mr. Phillips was convicted in this Court of four felony counts of fraud and money laundering and was sentenced to federal prison. The conviction was in largest part upheld on appeal. United States v. Mark E. Phillips, 704 F.3d 754 (9<sup>th</sup> Cir. 2012), *cert denied*, 133 S.Ct. 2796, (2013). His conviction arose from malfeasance during his stewardship of MOD Systems Incorporated ("MOD"), a company he controlled as majority shareholder and director. During the course of the criminal trial, Mr. Phillips assigned blame to many others. His testimony at trial was found not credible. *Id.* at 761-62.

Mark Phillips founded MOD in 2005. *Id.* at 757. In 2006, he approached Robert M. Arnold, a well-known and respected Seattle angel investor and philanthropist (*e.g.*, Arnold Pavilion, Fred Hutchinson Cancer Treatment Center), and solicited a \$3.5 million investment in MOD and another \$5.0 million (by 2008) in Phillips' company Banana Corporation ("Banana"). Mr. Arnold signed subscription agreements with MOD and Banana (*not* with Mark Phillips) to make investments, which he then made. *See Verified Complaint for Breach of Fiduciary Duty, Oppression of a Minority Shareholder, Fraud, Negligent Misrepresentation, Conversion,*

Accounting, Violation of Washington Securities Act, Corporate Waste, Civil Conspiracy, Declaratory Relief, Appointment of Custodian, Unjust Enrichment, Violation of Corporate Opportunities Doctrine, and Embezzlement, filed on February 18, 2009, in Robert M. Arnold, o/b/o MOD Systems, Inc. & Banana Corp. v. Mark Phillips, et al., King County Cause No. 09-2-07963-3 SEA. Ex. A, Second Decl. of Shaunta Knibb Re Request for Judicial Notice ¶ 2.a, at 2, 6-7, 13, 16-17 (dated May 22, 2014).

In the spring and summer of 2008, Mr. Arnold's financial advisor Cole Younger became alarmed about Arnold's large investments in MOD and Banana. Ex. A, Second Knibb Decl. ¶ 2.a, at 13, 17. Mr. Arnold learned that his shareholder interest in MOD would soon be substantially diluted by the issuance of preferred shares to Toshiba, NCR, and DeLuxe Corporations. He sought detailed information from Phillips regarding the financial condition of MOD, which information was largely not provided. *Id.* ¶ 2.a, at 13-14, 17. The limited information which was provided created deep concerns about malfeasance. After extensive investigation, in December 2008, Mr. Arnold served both MOD and Banana with a draft derivative complaint. Ex. G, Second Knibb Decl. ¶ 2.g, at 3, 202. Mr. Arnold was represented by Jeff Smyth.

MOD's board of directors duly appointed a demand review committee ("DRC") to independently investigate Mr. Arnold's allegations. The DRC issued formal findings, most of which corroborated Mr. Arnold's claims as they appeared in his derivative complaint. It found that Mr. Phillips had misappropriated from and owed to MOD \$1,295,864. Ex. B, Second Knibb Decl. ¶ 2.b, at 2, 56, 73-74, 78. As a result of those findings, Mr. Phillips resigned his positions as an officer and director of MOD, and placed his shares in an irrevocable voting trust. United States v. Mark E. Phillips, 704 F.3d at 760; Ex. B, Second Knibb Decl. ¶ 2.b, at 33-34, 37, 56.

On September 24, 2009, Phillips filed a Motion to Terminate the Voting Trust in the Arnold litigation, which motion was denied. *See* Ex. G, Second Knibb Decl. ¶ 2.g, at 3, 194-212.

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Both the pleadings and declarations filed by Mr. Phillips in conjunction with that motion confirm that his knowledge of the claims asserted here against Smyth and de Haan predated March 2010 as described in detail below.

In an arbitration initiated by MOD asserting its claims against Phillips for malfeasance, an award was entered against Phillips on June 23, 2010, by the Hon. George A. Finkle, Ret. as arbitrator. Ex. B, Second Knibb Decl. ¶ 2.b, at 2, 43, 50, 80-81. Judge Finkle ruled that Mr. Phillips had an obligation under a Transition Agreement which he had entered into with MOD, to reimburse MOD \$1,295,864 for, among other things, misappropriating funds and misusing employees, assets and resources in bad faith and contrary to the interests of MOD and its shareholders. Phillips was ordered to disgorge his entire shareholdings in MOD and further ordered to reimburse MOD for \$464,342.26 in attorney's fees and costs. *Id.*

On September 26, 2013, after a trial commencing in February 2013 (delayed by the death of Mr. Robert Arnold) the King County Superior Court (Hon. John Erlick presiding) in Robert M. Arnold o/b/o Banana Corporation v. Phillips, et al., King County Cause No. 10-2-10227-2 SEA (the "Banana Litigation"), entered Findings of Fact and Conclusions of Law ("Findings"), and a Judgment ("Judgment") in favor of the Estate of Robert M. Arnold (as assignee of Banana) against Mr. Mark Phillips and his wholly-owned company A Dot Corporation ("A-Dot"), in the aggregate sum of approximately \$7.1 Million. Exs. C & D, Second Knibb Decl. ¶¶ 2.c & 2.d, at 2, 151-169. The Judgment is based upon Mr. Phillips' breaches of fiduciary duty, corporate waste and looting, embezzlement, conversion, and unjust enrichment with regard to Banana. Ex. C, Second Knibb Decl. ¶ 2.c, at 2, 151-165. The Arnold Estate was represented by Jeff Smyth. Ms. de Haan is a personal representative for the Arnold Estate.

The Findings describe in detail misconduct committed by Mr. Phillips personally against Banana in the form of multiple unauthorized, improper transactions benefiting Mr. Phillips in 2006

1 and 2007, including a \$1 million consulting fee paid he paid himself through A-Dot in December,  
 2 2006; \$1,160,000 in consulting fees paid to himself through December 2006; a \$150,000 wire to  
 3 Phillips' controlled entities in October 2006; a \$500,000 wire to Phillips in February 2007; a  
 4 \$25,000 wire to himself in June 2007; \$705,000 in two income tax payments for his personal taxes  
 5 in 2007; and two payments to Phillips' close friend Douglas Lower in the amount of \$450,000 in  
 6 2006 and \$200,000 in February 2007. Ex. C, Second Knibb Decl. at 155-157, 162-163.

8 In the spring of 2009, Mr. Phillips, acting for Banana, had engaged the international  
 9 accounting firm KPMG LLP to independently investigate Mr. Arnold's claims against Mr. Phillips  
 10 as they related to Banana. *Id.* at 153 (Findings ¶ 6). In a lengthy report dated June 26, 2009, and  
 11 utilized at trial, KPMG found a wide variety of financial and corporate governance misconduct by  
 12 Mr. Phillips. *Id.* at 153 (Findings ¶¶ 6-7). Mr. Arnold had settled his derivative suit against  
 13 Banana by taking an assignment of Banana's claims against Phillips for waste, looting, conversion,  
 14 fiduciary breach, and unjust enrichment. *Id.* at 152-153 (Findings ¶ 5). As described above, Mr.  
 15 Phillips was found personally liable to Banana for millions of dollars. Exs. C & D, Second Knibb  
 16 Decl. at 150-170. Mr. Phillips advanced in defense of the Banana lawsuit many of the same  
 17 arguments he asserts here. Namely, that Mr. Arnold through his agents and attorneys violated his  
 18 subscription contracts, that they interfered with contractual expectancies, and that they conspired  
 19 with others to do him wrong. None of this was found to be credible. *See* Ex. C, Second Knibb  
 20 Decl. at 157-159 (Findings ¶¶ 22, 24, 28).

23 In 2013, Mr. Phillips filed two lawsuits with this Court: the instant case and the *pro se*  
 24 lawsuit, Phillips v. Cane, et al., Case No. 2:13-cv-00596-RSM. Examination of the two  
 25 Complaints shows extensive overlap, including the following illustrative duplicative allegations.  
 26 The instant Complaint paragraph is listed first and the "Cane Complaint" paragraph is listed  
 27 second: 16/8; 17/9; 18/10; 19/11; 20/12; 21/13; 22/14; 23/15; 24/16; 25/17; 39/19; 40/20; 41/21;  
 28



42/22; 43/23 (except replacing “Smyth” with “Cane”); 48/26; 49/27; 50/28; 57/29; 58/30; 59/31;  
 60/32; 61/34; 62/35 (except replacing “Smyth” with “Cane”); 65/36; 66/37; 67/38; 68/39; 69/40;  
 70/41; 72/43; 73/44; 74/45; 86/46; 87/47; 88/48; 89/51; 90/55; 91/61 and 63; 105/64; 106/65;  
 107/66; 108/67; 110/68; 111/69; 112/70; 130/77; 156/85; 162/91; 164/93 and 94; 175/97; 176/98;  
 and 177/99. The Cane Complaint (without exhibits) is attached as Exhibit G to the Declaration of  
Shaunta M. Knibb Re Request for Judicial Notice (filed 4/25/2013), beginning at page 110.

By order dated August 9, 2013 in Phillips v. Cane, this Court dismissed with prejudice the  
 claims against defendant Kyleen Cane for breach of fiduciary duty, fraud, and conspiracy on  
 statute of limitations grounds. Ex. E, Second Knibb Decl. ¶ 2.e, at 172-174, 177-180, 182. In  
 doing so, this Court took judicial notice of a letter dated March 4, 2010, from Phillips’ attorney  
 (the “Dhillon Letter”) (attached as Exhibit “D” to the Cane Complaint (2:13-cv-00596-RSM Dkt  
 #1-4)). See Ex. I, Second Knibb Decl. ¶ 3, at 3, 223-236. This Court found that the letter  
 established that Phillips’ claims for fraud, breach of fiduciary duty, and conspiracy accrued no  
 later than March 4, 2010, and dismissed those claims. The Dhillon Letter also mandates dismissal  
 of Smyth and de Haan on statute of limitations grounds.

**B. Pending State Law Claims of Phillips Against de Haan and Smyth**

Mr. Phillips’ fraud claim is premised on alleged but unidentified false representations by  
 Mr. Smyth and Ms. de Haan that Mr. Arnold would honor his contractual relations with Mr.  
 Phillips, based on the MOD subscription agreement, to which Phillips is not a party. The other  
 unsubstantiated allegation is that Mr. Arnold, in concert with Ms. de Haan, Mr. Smyth, and others,  
 “planned to remove Mr. Phillips from MOD and to take as much of his contractual and property  
 rights as possible.” Compl. ¶¶ 160-162. In fact, Mr. Phillips removed himself in the Transition  
 Agreement following the issuance of the MOD DRC report.

Mr. Phillips’ tortious interference claim is based on alleged theft of plaintiff’s information

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1 from an A-Dot computer, an alleged conspiracy to use that information against him, the alleged  
 2 filing of “baseless” claims in the MOD/Banana derivative lawsuit filed by Mr. Arnold, the  
 3 institution of the MOD Demand Review Committee, an attempt to force Mr. Phillips to relinquish  
 4 his interests and shares in MOD, and a desire to step into or assume the contractual rights and  
 5 benefits of plaintiff. Mr. Phillips contends those actions interfered with the already fully  
 6 performed subscription agreement between Robert Arnold and MOD, an employment Agreement  
 7 between Phillips and MOD, a fully performed subscription agreement between Banana and Mr.  
 8 Phillips, and a shareholders agreement between MOD, Phillips, and others. Compl. ¶¶ 134-146.

10 The tortious interference claim involving Banana-related contracts likewise contends the  
 11 alleged theft of plaintiff’s information from an A-Dot computer, an alleged conspiracy to use that  
 12 information; the alleged filing of “baseless” claims, and that a desire to step into or assume the  
 13 contractual rights and benefits of plaintiff interfered with a subscription agreement between Robert  
 14 Arnold and Banana Corporation, a Non-Exclusive License Agreement between Mr. Phillips and  
 15 Banana Corporation and a string of further contracts identical to those alleged in the other tortious  
 16 interference action. *Compare* Compl. ¶¶ 147-157 with Compl. ¶¶ 139, 151.

19 Mr. Phillips’ conspiracy claim alleges that Mr. Smyth and Ms. de Haan, professional  
 20 advisors to Mr. Arnold, conspired with all the other defendants to “wrongfully possess or steal as  
 21 much of plaintiff’s property as possible” and “to remove Mr. Phillips from any management or  
 22 ownership role in MOD and Banana in order to enrich themselves at Mr. Phillip’s expense.”  
 23 Compl. ¶¶ 173-175. Mr. Phillips’ trespass to chattels claim alleges Mr. Smyth and Ms. de Haan  
 24 “trespassed” A-Dot’s computer system and interfered with Mr. Phillips’ right to enjoy and operate  
 25 that computer system. Compl. ¶¶ 178-182. Mr. Phillips’ claim of conversion alleges that Mr.  
 26 Smyth and Ms. de Haan along with all other defendants willfully took possession of A-Dot’s  
 27 computers. Compl. ¶¶ 183-185.

C. Undisputed Proof that Phillips Knew of Facts Underlying Pending Claims Prior to March 12, 2010

A variety of documents show that Mr. Phillips was aware of the facts upon which all of his claims in this lawsuit are based long before March 12, 2010, the date three years before filing this lawsuit. In a Declaration of Mark Phillips dated September 24, 2009, filed in King County Superior Court as part of Mr. Phillips' unsuccessful Motion to Terminate the Voting Trust in the MOD Derivative lawsuit, Mr. Phillips made statements confirming his longstanding knowledge of the facts supporting his claims. *See* Ex. F, Second Knibb Decl. ¶ 2.f, at 3, 184-192. Phillips states in Paragraph 11 of his declaration as follows:

In October 2008, Jan Wallace told me that she had heard that Mr. Arnold was investigating me and might be filing a lawsuit against me and that Jeff Smyth had contacted her. She said she was communicating with Smyth through her lawyer and that she was "protecting my interest." **I later heard that Ms. Wallace sought out Mr. Arnold, instigated the claim and provided him with material that she took from my computer.** I do not know exactly what she took, what she gave to Mr. Arnold or his lawyer or what the Demand Review Committee looked at but **some of the allegations in the Complaint could only have come from Jan. For example, Complaint at paragraph F, 64-67, references a "Meteor Consulting" account in the Netherlands. This information could only have come from Jan or material she provided.**

*Id.* at 187-188 (emphasis added). Mr. Phillips also stated:

**As I said, it was actually Jan who first told me that Arnold might be suing and then I started receiving e-mails that Jeff Smyth was investigating me so it is not disputable that she went to Arnold before that time . . .**

\* \* \* \*

**I know now that Mr. Arnold's lawsuit was the result of material given to him and statements made to him by Jan Wallace. The allegations are false. Since the lawsuit was filed, Mr. Arnold, through his attorney, has constantly demanded payments from me personally including stock, real estate, a car and watches. He is not representing the interest of the company or the other shareholders.**

*Id.* at 188, 192 (paragraphs 12 & 24) (emphasis added).

Phillips filed his Motion to Terminate the Voting Trust on September 24, 2009. Ex. G,

1 Second Knibb Decl. ¶ 2.g, at 3, 194, 212. Like his declaration, the assertions in the motion itself  
 2 confirm that Phillips' knowledge of the facts underlying his claims pre-dates March 12, 2010. The  
 3 Motion states that in October 2008:

4 **[I]t was Wallace who had taken selective information off his computer and**  
 5 **provided it to Arnold and his attorney. It was this information that formed**  
 6 **the alleged factual basis for Arnold's lawsuit.**

7 *Id.* at 198 (lines 7-9) (emphasis added). The motion also argues,

8 In this case, it is far from clear what the purpose of the voting trust was **other**  
 9 **than to wrest control of MOD Systems from Mr. Phillips so that Wallace and**  
 10 **Cane could take over the company and loot it.**

11 *Id.* at 206 (lines 7-10) (emphasis added).

12 On October 8, 2009, Phillips filed a Reply in Support of the Motion to Terminate Voting  
 13 Trust. Ex. H, Second Knibb Decl. ¶ 2.h, at 3, 214-221. In that Reply, Phillips through his counsel  
 14 stated as follows:

15 Mr. Phillips will move for dismissal of the shareholder derivative allegations . . .  
 16 in Mr. Arnold's amended complaint. Regardless of its questionable  
 17 underpinnings, however, one point is clear: **The law firm that is in charge of**  
 18 **deciding whether to honor Mr. Phillips' revocation of his voting trust is the**  
 19 **same firm that is suing him individually for, among other things, fraud and**  
 20 **misrepresentation.**

21 **The trust has no evident purpose other than to wrest effective control of**  
 22 **MOD Systems from Mr. Phillips,** even though he remains a 70 percent  
 23 shareholder in the corporation. **What is worse, the voting trust that was used to**  
 24 **oust him from his own company is in control of the very lawyers who are**  
 25 **suing him** and Anthony Bay, MOD's CEO who was originally sued in the case.  
 26 After the DRC report was issued and it became clear that Bay was on board with  
 27 **the scheme to take away the company,** he was dismissed from the case . . . .

28 *Id.* at 217-218 (beginning on line 20 of page 217) (emphasis added).

By letter dated September 30, 2009, directed to certain MOD Systems Series A  
 shareholders, Mr. Phillips' then counsel Mark Johnson also made statements confirming Phillips'  
 knowledge at that time. *See* Ex. J, Second Knibb Decl. ¶ 4, at 3, 238-240. For example, Phillips'

counsel stated: “We have performed an extensive search for information on Jan Wallace, who we believe is the individual who instigated the lawsuit against Mr. Phillips and MOD.” *Id.* at 238. The letter also stated, “This lawsuit is simply extortion by litigation. It is not a coincidence that this lawsuit was filed shortly after Toshiba, NCR, and Deluxe Entertainment Services Group, Inc. funded the company with \$35,000,000; it was motivated by that funding. The allegations in the Arnold lawsuit, however histrionic, are not evidence. The conflicts of interest on behalf of Ms. Cane and Mr. Bay are profound, and the DRC report is a sham.” *Id.* at 240.

In a Declaration of Mark Phillips dated January 6, 2010, also filed in King County Superior Court, Phillips again testified personally confirming his longstanding knowledge of the factual basis for his claims. The declaration is largely identical to his testimony in his unsuccessful motion to terminate the voting trust. *See* Ex. D, Decl. of Shaunta Knibb re Request for Judicial Notice ¶ 2.d, at 2, 65-75 (Dkt. #9-4). He states in Paragraph 25 of this declaration as follows:

**I later heard that Ms. Wallace had sought out Mr. Arnold, instigated the claim and provided him with material that she took from my computer. I do not know exactly what she took, what she gave to Mr. Arnold or his lawyer, or what the Demand Review Committee looked at, but some of the allegations in Mr. Arnold’s initial complaint could only have come from Jan. For example, the complaint references a “Meteor Consulting” account in the Netherlands. This information could only have come from Jan or material she provided to Arnold or his representatives.”**

*Id.* at 71 (emphasis added).<sup>1</sup>

This court relied extensively on yet another letter dated March 4, 2010, by Phillips’ then counsel Harmeet Dhillon (the “Dhillon Letter”) in dismissing Phillips’ claims against Ms. Cane on statute of limitations grounds by its order dated August 12, 2013. *See, e.g.*, Order Granting

<sup>1</sup> He similarly testified in state court that in March of 2009, he was questioned by the MOD DRC about certain documents and emails that he was “told” came from “Wallace and Smyth” and that when read the DRC Report, he was “shocked that David Douglas, Cane, Bay, and Smyth had illegally accessed mine, A Dot, and Banana’s computer files, accounting records, and trade secrets.” *See* Defendants Phillips’ Dec. in Supp. of his Opp. of Plaintiff’s Mot. to Strike Impertinent Material ¶¶ 15, 17 (dated June 8, 2012), attached as Ex. B to Knibb Decl. Re Request for Judicial Notice, at 38-39 (filed 4/25/13) (Dkt. Nos. 9 & 9-2).

Defendant's Motion to Dismiss and Motion to Strike, at 6:16-7:21 (filed 8/9/13) (Dkt. #22 in 2:13-cv-00596-RSM, attached as Ex. E, Second Knibb Decl. ¶ 2.e, at 3, 177-178. The Dhillon Letter is equally powerful evidence in favor of dismissal of the claims against Ms. de Haan and Mr. Smyth on the same grounds. It states in pertinent part as follows:

Mr. Phillips, who owns the majority of the intellectual property that MOD seeks to exploit and a majority of the company's shares, ran MOD until March, 2009, when he was forced by board member Kyleen Cane to step down from Chairmanship and Chief Executive Officer positions based upon accusations of mismanagement and conflict of interest by a minority shareholder, Robert M. Arnold, in Arnold's February, 2009 lawsuit against MOD. **Arnold's advisor and attorney in fact, Juila de Haan, worked hand-in-hand with Cane and Wallace [Jardin] to engineer the lawsuit. Cane coerced Phillips into placing his majority shareholdings in a voting trust controlled by Cane as the sole trustee.**

Ex. I, Second Knibb Decl. ¶ 3, at 3, 229-230 (emphasis added). The Dhillon Letter also described a supposed intent to file:

**False Claims Act complaints regarding the conduct of a MOD director and that individual's longstanding business associates, including the individual who instigated Robert Arnold's lawsuit presently pending against MOD's former Chief Executive Officer and founder, Mark Phillips, and related actions.**

*Id.* at 225 (emphasis added).

The Dhillon Letter further states that "**Robert Arnold's, financial advisor, Julia de Haan, who was fully aware of the falsity of the allegations in legal pleadings she approved on Arnold's behalf,**" was part of a "**control group**" bent on hurting MOD and Phillips. *Id.* at 225-226 (emphasis added). The letter characterizes the control group as a "**fraud ring.**" *Id.* at 227 (emphasis added). The letter further states:

**Mr. Phillips has been locked out of MOD, the company he and his colleagues founded, and has been denied access to corporate books and records required to defend the lawsuit against him and pursue his own claims against Arnold and the racketeers. Mr. Phillips was summarily terminated by the company (controlled by Bay, Cane and Hotard with Arnold's support). . . .**

1 *Id.* at 230. The letter states that “a Demand Review Committee (‘DRC’)” was formed “to review  
 2 the allegations by Mr. Arnold” and that “[d]uring the course of its ‘investigation,’ Cane  
 3 attempted to pressure Phillips into transferring the entirety of his share holdings to Arnold  
 4 in order to settle the lawsuit (and Arnold’s shares, in turn, were in control of Julia de Haan,  
 5 who worked hand in hand with Wallace and Cane to engineer the lawsuit).” *Id.* at 231. The  
 6 letter also identified Phillips’ intent, without MOD’s cooperation to “Pursue legal action against  
 7 Arnold, Cane, Wallace, Bay, Hotard, De Bakker and their accomplices and affiliates for the  
 8 full amount of damages caused to MOD and MOD’s ousted officers and directors,” of which  
 9 Mark Phillips was one. (emphasis added). *Id.* at 235-236.

10  
 11  
 12 Phillips’ claims for fraud, tortious interference, and conspiracy in this case are all based on  
 13 the same allegations. As to fraud, Phillips’ Complaint at paragraph 162 states: “Mr. Arnold, alone  
 14 and in concert with his agents, Ms. de Haan and Mr. Smyth, as well as in concert with Ms.  
 15 Wallace, upon learning of the success of MOD and its investment from Toshiba, planned to  
 16 remove Phillips from MOD and to take as much of his contractual and property rights as possible.”  
 17 Compl. ¶ 162. As to Phillips’ two tortious interference causes of action, Complaint paragraphs  
 18 141 and 152 allege the interference was motivated by a desire to “step into or assume the  
 19 contractual rights and benefits of plaintiff.” Compl. ¶¶ 141, 152. Complaint paragraph 140  
 20 provides examples of that alleged interference: the filing of “baseless” claims, the institution of  
 21 the MOD demand review committee, and an attempt to force Phillips to relinquish his interests and  
 22 shares in MOD and A-Dot. Compl. ¶ 140. As to conspiracy, Phillips alleges that the “goal of the  
 23 conspiracy was to wrongfully possess or steal as much of plaintiff’s property as possible, thus  
 24 enriching themselves at plaintiff’s expense.” Compl. ¶ 175. Phillips alleges that “Ms. Wallace  
 25 conspired with her long time partner Ms. Cane, as well as defendants Mr. Arnold, Ms. de Haan,  
 26 Mr. Smyth and Mr. Lundvall to remove plaintiff from any management or ownership role in MOD  
 27  
 28



1 and Banana in order to enrich themselves at Mr. Phillips' expense." *Id.* All of the above letters,  
 2 declarations, and pleadings confirm Mark Phillips' knowledge of those claims well before March  
 3 12, 2010, three years before the filing of the Complaint in this action.

### 4 **III. LEGAL ARGUMENT**

#### 5 **A. Summary Judgment Standard**

6 Summary judgment is warranted if the "movant shows that there is no genuine dispute as  
 7 to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P.  
 8 56(a). The moving party has the burden of establishing the absence of a genuine dispute of  
 9 material fact. City of Pomona v. SQM North Am. Corp., \_\_ F.3d \_\_, 2014 WL 1724505 (9<sup>th</sup> Cir.  
 10 May 2, 2014) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d  
 11 265 (1986)). "The court must view the evidence in the light most favorable to the non-movant and  
 12 draw all reasonable inferences in the non-movant's favor." *Id.* (citing Clicks Billiards Inc. v.  
 13 Sixshooters Inc., 251 F.3d 1252, 1257 (9th Cir. 2001)). Although "[c]redibility determinations,  
 14 the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury  
 15 functions, not those of a judge . . . ruling on a motion for summary judgment," the "mere existence  
 16 of a scintilla of evidence in support of the plaintiff's position [is] insufficient . . . ." Anderson v.  
 17 Liberty Lobby, Inc., 477 U.S. 242, 252, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Moreover,  
 18 "[w]here the record taken as a whole could not lead a rational trier of fact to find for the  
 19 nonmoving party, there is no genuine issue for trial." Matsushita Elec. Indus. Co., Ltd. v. Zenith  
 20 Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) (citation and quotation  
 21 marks omitted). This is clearly the situation here.

#### 22 **B. Request for Judicial Notice**

23 The court may take judicial notice of an adjudicative fact "not subject to reasonable  
 24 dispute" when it can be "accurately and readily determined from sources whose accuracy cannot  
 25



1 reasonably be questioned.” Fed.R.Evid. 201(b). Judicial notice can be taken of other court  
 2 proceedings and opinions. Lee v. City of Los Angeles, 250 F.3d 668, 690 (9th Cir. 2001) (court  
 3 opinion); U.S., ex rel Robinson Rancheria Citizens Council v. Borneo, Inc., 971 F.2d 244, 248 (9<sup>th</sup>  
 4 Cir. 1992) (other court proceedings). It can also be taken of previously filed declarations. Harris  
 5 v. County of Orange, 682 F.3d 1126, 1131 (9th Cir. 2012) (declaration); and Nucal Foods Inc. v.  
 6 Quality Egg LLC, 887 F. Supp. 2d 977, 984-85 (E.D. Cal. 2012) (pleadings and affidavits filed in  
 7 state court proceedings). Additionally, although normally used in the context of a motion to  
 8 dismiss, rather than a summary judgment, the court may take judicial notice of documents on  
 9 which allegations in the Complaint necessarily rely. In re Gilead Sciences Sec. Litig., 2005 WL  
 10 181885, \*4 (N.D. Cal. Jan. 26, 2005) (“the Court may take judicial notice of documents on which  
 11 allegations in the [complaint] necessarily rely, even if not expressly referenced in the [complaint],  
 12 provided the authenticity of those documents is not in dispute.”). Finally, judicially noticed dates  
 13 may be used to grant a motion to dismiss. Critchlow v. Critchlow, 2013 WL 670448, at \*7 (N.D.  
 14 Cal. Feb. 25, 2013) (dismissing on basis of statute of limitations).

15  
 16  
 17  
 18 Based on the above authority, defendants request the Court to take judicial notice of and to  
 19 consider as evidence supporting this motion the following documents attached to the Declaration  
 20 of Shaunta Knibb re Request for Judicial Notice (filed 4/25/2013) (Dkt. #9) and the Second  
 21 Declaration of Shaunta M. Knibb Re Request for Judicial Notice filed herewith, in support of this  
 22 motion and request for judicial notice:

23  
 24 1. Defendants Phillips’s Declaration in Support of his Opposition of Plaintiff’s  
 25 Motion to Strike Impertinent Material (dated June 8, 2012), filed in Robert M. Arnold o/b/o  
 26 Banana Corporation v. Mark Phillips, et al. under King County Cause No. 10-2-10227-2 SEA.  
 27 Ex. B, Decl. of Knibb re Request for Judicial Notice at 65-84 (filed 4/25/2013) (Dkt. #9).

28 2. Declaration of Mark Phillips in Support of Phillips’ Opposition to MOD

MOTION FOR SUMMARY JUDGMENT - 17

Case No. 2:13-cv-00444-RSM

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LAW OFFICES  
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1 Systems Incorporated's Emergency Motion to Compel Arbitration and Selection of an Arbitrator  
 2 (dated January 6, 2010). Ex. D, Decl. of Knibb re Request for Judicial Notice at 65-84 (filed  
 3 4/25/2013) (Dkt. #9).

4  
 5 3. Complaint filed on April 2, 2013, in Phillips v. Cane, in the U.S. District  
 6 Court for the Western District of Washington under Cause No. 2:13-cv-00596-JCC. Ex. G, Decl.  
 7 of Knibb re Request for Judicial Notice at 65-84 (filed 4/25/2013) (Dkt. #9).

8 4. Verified Complaint for Breach of Fiduciary Duty, Oppression of a  
 9 Shareholder, Fraud, Negligent Misrepresentation, Conversion, Accounting, Violation of  
 10 Washington Securities Act, Corporate Waste, Civil Conspiracy, Declaratory Relief, Appointment  
 11 of Custodian, Unjust Enrichment, Violation of Corporate Opportunities Doctrine, and  
 12 Embezzlement, filed on February 18, 2009 in Robert M. Arnold, o/b/o MOD Systems, Inc. &  
 13 Banana Corp. v. Mark Phillips, et al., King County Cause No. 09-2-07-963-3 SEA. Ex. A, Second  
 14 Knibb Decl. ¶ 2.a, at 2, 7-27.

15  
 16 5. Declaration of Derek De Baker in Support of Defendant Kyleen Cane's  
 17 Motion to Dismiss, or, in the Alternative, Motion for Summary Judgment, filed 5/16/2013, in the  
 18 United States District Court for the Western District of Washington, as Dkt. #13 in Phillips v.  
 19 Cane, 2:13-cv-00596-JCC. Ex. B, Second Knibb Decl. ¶ 2.b, at 2, 28-149.

20  
 21 6. The Findings of Fact and Conclusions of Law and Judgment entered in  
 22 Robert M. Arnold o/b/o Banana Corporation v. Phillips, et al., King County Cause No. 10-2-  
 23 10227-2 SEA. Exs. C & D, Second Knibb Decl. ¶ 2.c, at 2, 150-170.

24  
 25 7. Order Granting Defendant's Motion to Dismiss and Motion to Strike filed  
 26 8/9/13 in Phillips v. Cane, in this Court under case number 2:13-cv-00596-RSM. Ex. E, Second  
 27 Knibb Decl. ¶ 2.e, at 3, 171-182.

28 8. Declaration of Mark Phillips dated September 24, 2009, filed in Arnold v.

1 Phillips, et al., King County Superior Court Cause No. 09-2-07963-3 SEA. Ex. F, Second Knibb  
 2 Decl. ¶ 2.f, at 3, 183-192.

3 9. Defendants Phillips' Motion to Terminate Voting Trust and to Remove  
 4 Kyleen Cane and Anthony Bay from Demand Review Committee (filed Sept. 24, 2009) and  
 5 Defendant Phillips' Reply in Support of Motion to Terminate Voting Trust and in in to Remove  
 6 Kyleen Cane and Anthony Bay from Demand Review Committee (filed Oct. 8, 2009), in Arnold v.  
 7 Phillips, King County Superior Court Cause No. 09-2-07963-3 SEA. Exs. G & H, Second Knibb  
 8 Decl. ¶ 2.g & 2.h, at 193-221.

9  
 10 Additionally, defendants request that the court take judicial notice of the Ninth Circuit's  
 11 published decision in United States v. Mark E. Phillips, 704 F.3d 754 (9<sup>th</sup> Cir. 2012).  
 12

13 C. Each of the State Law Claims Is Time-Barred

14 1. Fraud

15 The statute of limitations for fraud is three years. RCW 4.16.080(4). A limitations period  
 16 begins to run on the date that a cause of action accrues. Crownover v. State, ex rel. Dept. of  
 17 Transp., 165 Wn. App. 131, 141, 265 P.3d 971, 977 (2011). A cause of action for fraud accrues  
 18 when the aggrieved party discovers the facts of the alleged fraud. RCW 4.16.080(4); Hudson v.  
 19 Condon, 101 Wn. App. 866, 875, 6 P.3d 615, 620 (2000). Actual knowledge of fraud may be  
 20 inferred, "if the aggrieved party, through due diligence, could have discovered it." *Id.*  
 21 "Accordingly, the statute of limitations for a damage action based on fraud commences when the  
 22 aggrieved party discovers, or should have discovered, the fact of fraud and sustains some damage  
 23 as a consequence." *Id.*

24 Mr. Phillips' pending state law fraud claim is premised on allegations that Mr. Arnold, in  
 25 concert with Ms. de Haan, Mr. Smyth, and Ms. Wallace "planned to remove Mr. Phillips from  
 26 MOD and to take as much of his contractual and property rights as possible." Compl. ¶ 162. The  
 27  
 28

1 declarations and letters quoted confirm Mr. Phillips' knowledge of that alleged behavior before  
 2 March 12, 2010. The Dhillon Letter dated March 10, 2010, expresses an intent "to pursue legal  
 3 action against Arnold, Cane, Wallace, Bay, Hotard, De Bakker and their accomplices and affiliates  
 4 for the full amount of damages caused to MOD *and* MOD's ousted officers and directors." Ex. I,  
 5 Second Knibb Decl. ¶ 3, at 235 (emphasis added). It claims that Phillips was forced to step down  
 6 from his majority shareholder and CEO position, that de Haan acted hand in hand with Cane and  
 7 Wallace to engineer the lawsuit for fraudulent purposes, caused the DRC to be formed, coerced  
 8 Phillips into placing his shares into the Voting Trust, pressured him to relinquish his shares to  
 9 Arnold and violated a variety of contracts in the process. *Id.* at 229-231. The October 8, 2009  
 10 Reply in Support of Defendant Phillips' Motion to Terminate Voting Trust asserts that "the voting  
 11 trust that was used to oust him [Phillips] from his own company is in control of the very lawyers  
 12 who are suing him" and describes a "scheme to take away the Company" from Mr. Phillips. Ex.  
 13 H, Second Knibb Decl. ¶ 2.h, at 3, 217-218. The Motion to Terminate Voting Trust dated  
 14 September 24, 2009, claims that the purpose of the voting trust was "to wrest control of MOD  
 15 Systems away from Mr. Phillips so that Wallace and Cane could take over the company and loot  
 16 it." Ex. G, Second Knibb Decl. ¶ 2.g, at 3, 206.

20 Phillips clearly knew by March 4, 2010, of Smyth and de Haan's alleged fraudulent scheme  
 21 to take control of his shares and his company and the alleged damages that caused. Accordingly,  
 22 because the cause of action accrued no later than March 4, 2010, and the Complaint was filed on  
 23 March 12, 2013, the three-year statute of limitations has run on Phillips' claim for fraud.

## 25 2. Tortious Interference

26 The statute of limitations for tortious interference with a contract or business expectancy is  
 27 three years. RCW 4.16.080(2); City of Seattle v. Blume, 134 Wn.2d 243, 251, 947 P.2d 223  
 28 (1997). The action accrues when the plaintiff knows or should know the relevant facts, whether or

not the plaintiff also knows that these facts are enough to establish a legal cause of action. Were the rule otherwise, the discovery rule would postpone accrual in every case until the plaintiff consults an attorney. Allen v. State, 118 Wn.2d 753, 758, 826 P.2d 200 (1992). The pending tortious interference claims are premised on the filing of alleged baseless claims, the institution of the MOD DRC, an attempt to force Phillips to relinquish his interests and shares in MOD, and a desire to step into or assume the contractual rights and benefits of plaintiff. Compl. ¶¶ 134-146. The 2009 Motion to Terminate Voting Trust and supporting pleadings and the March 4, 2010 Dhillon Letter describes precisely that behavior. Thus, Phillips knew or should have known by no later than March 4, 2010, that a cause of action against Smyth and de Haan for alleged interference with contract rights had accrued. Accordingly, because the cause of action accrued no later than March 4, 2010, and the Complaint was filed on March 12, 2013, the three-year statute of limitations has run on Phillips' claim for tortious interference.

### 3. Conspiracy

A claim for conspiracy is only viable if the underlying claim from which it derives is actionable. Northwest Laborers-Employers Health & Sec. Trust Fund v. Philip Morris, Inc., 58 F. Supp. 2d 1211, 1216 (W.D. Wash. 1999). Phillips alleges that "Ms. Wallace conspired with her long time partner Ms. Cane, as well as defendants Mr. Arnold, Ms. de Haan, Mr. Smyth, and Mr. Lundvall to remove Mr. Phillips from any management or ownership role in MOD and Banana in order to enrich themselves at Mr. Phillips' expense." Compl. ¶ 175. Thus, Phillips' conspiracy claim necessarily depends on the viability of the fraud claim and tortious interference claim, which are time barred. *See Spencer v. Peters*, 2012 WL 4514417, at \*8 (W.D. Wash. Oct. 2, 2012) (dismissing civil conspiracy claim on ground that underlying claim was time-barred).

### 4. Trespass to Chattels and Conversion

The Court's Order of August 16, 2013, in this action also justifies dismissal of Phillips'

1 trespass to chattels and conversion claims. There, the court found that a “fair reading of the  
 2 Complaint demonstrates that Phillips observed numerous times in 2008 and 2009 that his  
 3 computers were accessed and that his data was taken . . . .” Order on Mot. to Dismiss, at 11 (Dkt.  
 4 #27). Phillips himself alleges in this lawsuit that his conversion claim began in “2008.” *See, e.g.,*  
 5 Compl. ¶¶ 58, 61, 114, 140. His earlier declarations filed in other proceedings also demonstrate  
 6 and discuss the alleged improper access to his computers. *See, e.g.,* Ex. D, Knibb Decl. re Request  
 7 for Judicial Notice ¶ 2.d, at 2, 65-75 (Dkt. #9-4); Ex. F, Second Knibb Decl. ¶ 2.f, at 3, 184-188.  
 8 Conversion claims are subject to a three-year catchall statute of limitations under RCW  
 9 4.16.080(2). Crisman v. Crisman, 85 Wn. App. 15, 19, 931 P.2d 163 (1997). The trespass to  
 10 chattels claim also logically falls within the catchall statute of limitations. *See* RCW 4.16.080(2)  
 11 (“The following actions shall be commenced within three years: . . . (2) An action for taking,  
 12 detaining, or injuring personal property, including an action for the specific recovery thereof, or for  
 13 any other injury to the person or rights of another not hereinafter enumerated”).

16 D. Mr. Phillips Has Failed to State a Valid Cause of Action for Conspiracy

17 While the statute of limitations is determinative, Phillips’ claims for conspiracy can also be  
 18 dismissed on an independent basis. Under Washington law, to establish a conspiracy plaintiff  
 19 must prove by clear, cogent and convincing evidence that (1) two or more people combined to  
 20 accomplish an unlawful purpose, or combined to accomplish a lawful purpose by unlawful means;  
 21 and (2) the conspirators entered into an agreement to accomplish the conspiracy.” All Star Gas v.  
 22 Bechard, 100 Wn. App. 732, 740, 998 P.2d 367 (2000). However, “when the facts and  
 23 circumstances relied upon to establish a conspiracy are as consistent with a lawful or honest  
 24 purpose as with an unlawful undertaking, they are insufficient.” *Id.*

25 Here, even assuming all reasonable inferences in Phillips’ favor, the acts of Mr. Arnold,  
 26 Ms. de Haan, and Mr. Smyth are at minimum equally consistent with the lawful and honest

purpose of a shareholder holding Phillips to account for his misconduct. Misconduct by Mark Phillips has been repeatedly found to exist by the DRC, by the arbitrator, by Judge Erlick in the Banana Litigation, and by this court in the criminal proceeding. “An act consistent with a lawful and honest undertaking cannot form the basis of a civil conspiracy.” Allstate Ins. Co. v. Tacoma Therapy, Inc., 2014 WL 1494100, at \*3 (W.D. Wash. April 16, 2014) (citing Lewis Pac. Dairymen’s Ass’n v. Turner, 50 Wn.2d 762, 772, 314 P.2d 625 (1957)). Phillips action for conspiracy fails on this basis as well.

E. Mr. Phillips Cannot Prove Improper Purpose or Means for a Tortious Interference Claim as a Matter of Law

While the statute of limitations is determinative, Phillips’ claims for tortious interference can also be dismissed on an independent basis. A claim for tortious interference with a contract or business expectancy requires five elements: (1) the existence of a valid contractual relationship or business expectancy, (2) that defendants had knowledge of that relationship, (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy, (4) that defendants interfered for an improper purpose or used improper means, and (5) resultant damage. Leingang v. Pierce County Med. Bur., Inc., 131 Wn.2d 133, 157, 930 P.2d 288 (1997). Phillips cannot show item 4, “improper purpose or used improper means,” as a matter of law.

Here, Phillips’ tortious interference claims are premised on the alleged filing of baseless claims, the institution of the MOD Demand Review Committee, an attempt to force Phillips to relinquish his interests and shares in MOD and A-Dot, and a desire to step into or assume the contractual rights and benefits of plaintiff. Compl. ¶¶ 134-146. Yet it is clear that the DRC, the arbitrator, the King County Superior Court, and this Court acting in the criminal action all found the accusations of misconduct against Phillips to have merit, and all four found against Phillips. Mr. Smyth and Ms. de Haan were demonstrably acting on Mr. Arnold’s behalf to protect the



1 companies in which he had invested from Phillips' demonstrable misconduct when the verified  
 2 complaint on behalf of Mr. Arnold was filed. "Exercising in good faith one's legal interests is not  
 3 improper interference." Leingang, 131 Wn.2d at 157. Moreover, any damage or disgrace that  
 4 Phillips suffered as a result of actually being held to account for his own misconduct are  
 5 attributable to his *own* misconduct, not to the participation of Mr. Smyth and Ms. de Haan as  
 6 Robert Arnold's representatives in holding Phillips to account. Phillips' causes of action for  
 7 tortious interference should be rejected on that basis as well.

#### 8 **IV. CONCLUSION**

9  
 10 By affording complete closure through dismissal of all state law claims with prejudice, the  
 11 Court will end litigation that should never have been filed in the first place, and foreclose further  
 12 duplicative litigation by Mr. Phillips.  
 13

14 DATED this 22<sup>nd</sup> day of May, 2014.

15 s/ Shaunta M. Knibb

16  
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26 *Attorneys for Defendants Julia de Haan,*  
 27 *Jeffrey Alan Smyth*



**CERTIFICATE OF SERVICE**

Cheryl L. Spangler makes the following statement under penalty of perjury under the laws of the State of Washington:

1. I am a legal assistant at the law firm of Smyth & Mason, PLLC. I make this declaration of my own personal knowledge about matters of which I am competent to testify.

2. On May 22, 2014, I caused to be served a true and correct copy of the foregoing *DEFENDANTS DE HAAN'S AND SMYTH'S MOTION FOR SUMMARY JUDGMENT OF DISMISSAL OF CLAIMS FOR TORTIOUS INTERFERENCE WITH CONTRACT (MOD); TORTIOUS INTERFERENCE WITH CONTRACT (BANANA); FRAUD; CONSPIRACY; TRESPASS TO CHATTELS; AND CONVERSION* on the following parties via United States District Court – Western District of Washington's Electronic Case Filing System ("ECF") at the following addresses:

• **Reed Anthony Yurchak**

yurchaklaw@gmail.com

DATED at Seattle, Washington, this 22<sup>nd</sup> day of May, 2014.

s/ Cheryl L. Spangler

Cheryl L. Spangler, Legal Assistant